ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information;	)	
	)	
Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149

COMMENTS OF SPRINT CORPORATION

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COMMENTS OF SPRINT CORPORATION

Sprint Corporation ("Sprint"), on behalf of its operating subsidiaries, hereby respectfully submits its comments on the *Second Further Notice of Proposed Rulemaking*, FCC 01-247 (released September 7, 2001) (*Second FNPRM*) in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY.

The Commission seeks additional comments, *inter alia*, on the acceptable methods that carriers can employ to obtain their customers' consent as required by Section 222 of the Act, 47 USC §222, for using and disclosing the proprietary network information of such customers ("CPNI") for marketing purposes. The Commission states that its decision to again examine the customer consent issue is compelled by the 1999 decision of Court of Appeals for the 10th Circuit in *U S West Inc. v. FCC,* 182 F.3d 1224 (10th Cir. 1999), *cert. denied,* 120 S. Ct. 2215 (2000). There the Court held that the Commission's so-called "notice and opt-in" approach for

obtaining such consent adopted in the *Second Report and Order*, 13 FCC Rcd 8061 (1998) ("*CPNI Order*"), constituted an unjustified restraint on the free speech rights of carriers and, therefore, violated the First Amendment of the Constitution.

Sprint believes that such re-examination is unnecessary. All carriers must comply with the requirements of Section 222, including the requirement for obtaining customer consent, just as they must comply with other provisions of Title II. Given the fact that there is nothing in the *Second FNPRM* that suggests that any carrier is ignoring its Section 222 obligations and abusing the CPNI rights of its customers, the Commission need not attempt to resurrect the regulatory paradigm adopted in the *CPNI Order* for obtaining customer consent.

Sprint further recommends that the Commission should not consider the privacy issues associated with the availability of wireless customer location information in this proceeding. Rather, this important privacy issue should be addressed in the proceeding (Docket No. 01-72) that the Commission has already commenced.

II. THERE IS NO NEED TO RE-EXAMINE OR ATTEMPT TO RE-JUSTIFY ON CONSTITUTIONAL GROUNDS THE NOTICE AND OPT-IN SCHEME ADOPTED IN THE *CPNI ORDER*.

The Commission's "notice and opt-in" approach adopted in the *CPNI Order* required that a carrier "notify the customer of the customer's rights under Section 222 and then obtain express, written, oral or electronic customer approval...before a carrier [could] use [the customer's] CPNI to market services outside the customer's existing service relationship with that carrier." *Second FNPRM* at ¶3. The Commission explained that such an approach was justified because it met what the Commission found was the overarching purpose of Section 222 of balancing "both competitive and consumer privacy interests with respect to CPNI." *Id.* at ¶2 (internal quotes omitted).

The 10th Circuit disagreed with the Commission's view that Section 222 was concerned with competition. It found that "[w]hile the broad purpose of the Telecommunications Act of 1996 is to foster increased competition in the telecommunications industry" there was nothing in Section 222 demonstrating "that the interest in promoting competition was a significant consideration in the enactment of [such section]." *US West v. FCC*, 182 F.3d at 1236. Rather, the Court found that "the specific and dominant purpose of § 222 is the protection of customer privacy." The Court then went on to explain that because the Commission's notice and opt-in regulation "implicate[d] the First Amendment by restricting protected commercial speech," *id.* at 1233, the Commission's regulation had to meet the three-part test set forth in *Central Hudson Gas & Electric Corp v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980) in order to pass Constitutional muster.

Specifically, the Commission had to demonstrate that "it has substantial state interest in regulating the speech"; that "the regulation directly and materially advances that interest"; and that "the regulation is no more extensive than necessary to serve the interest." *U S West v. FCC,* 182 F.3d at 1233 (citations and internal quotations omitted). Although the Court expressed some skepticism that the Commission's concern over the "protection of customer privacy" was substantial enough to justify the regulation at issue, it accepted for purposes of the appeal that there was a substantial state interest in such protection. *Id.* at 1235-36. But it found that the Commission had not explained how the notice and opt-in regulatory scheme adopted by the Commission "directly and materially advance[d] such interest." *Id.* at 1237-38. Equally important, the Court concluded that the Commission could not demonstrate that the opt-in approach was narrowly tailored to further the state's interest in protecting consumer privacy, especially when the Commission did not "adequately consider an obvious and substantially less

restrictive alternative, an opt-out strategy...." *Id.* at 1238. Thus, the Court held that that the Commission's opt-in regime could not be justified under a First Amendment analysis, and it vacated the *CPNI Order*. *Id.* at 1240.

In the *Second FNPRM* the Commission "seek[s] to obtain a more complete record on the ways in which customers can consent to a carrier's use of their CPNI." It asks the parties to respond to a plethora of questions in order the elicit the type of information the Commission believes would enable it to perform the type of analysis the Court found lacking in the *CPNI Order*. Sprint certainly understands the Commission's desire as an institution to address the Court's criticisms of the *CPNI Order* and the opt-in method adopted therein. But Sprint respectfully suggests that unless there are indications that carriers are using and disclosing their customers' CPNI in ways that fail to give customers the ability to protect the privacy of their CPNI -- and there in nothing in the *Second FNPRM* that would so indicate -- there is absolutely no need for the Commission to conduct this type of inquiry. Stated differently, the Commission should not seek to develop a solution to a problem that does not exist.

It is not surprising that in the over two years since the Court ruled that the Commission's notice and opt-in method restricted the free speech rights of carriers in violation of the First Amendment, no serious problems associated with carriers' use of their customers' CPNI have arisen. Section 222, like other provisions of the Act, *e.g.*, Sections 201 and 202, is self-executing and there is nothing in the provision that requires the Commission to establish a regulatory structure to ensure that carriers comply with the obligations directly imposed upon them by such Section. Those carriers that want to use their customers' CPNI to market other products and services outside of their existing service relationship with their customers or share the CPNI with their affiliates must, under the explicit terms of Section 222(c)(1), obtain their customers'

approval before doing so. Of course, given the 10th Circuit's decision vacating the Commission's prescribed method for obtaining such approval, carriers now have the flexibility to devise efficient and unobtrusive methods for meeting their Section 222(c)(1) obligations. But the fact that carriers have such flexibility does not mean that they are violating Section 222 and using their customers' CPNI to market the products and services offered by their affiliates or sharing their customers' CPNI with such affiliates without first informing their customers' of their CPNI rights and gaining their customers' approval for such use.

Sprint's subsidiaries that utilize their customers' CPNI to offer the products and services of their sister companies which may be of interest to such customers, but which are unrelated to their customers' current services, fully understand that they must obtain their customers' consent before doing so. And, in the wake of the 10th Circuit's decision, such subsidiaries have employed a notice and opt-out method of gaining their customers' consent in this regard. After the 10th Circuit's decision became final, Sprint's long distance subsidiary ("Sprint LD") sent notices to its customers telling them what constitutes CPNI and informing them that it may use their CPNI to market unrelated products and services offered by other Sprint companies. However, Sprint LD's notice also included a toll free number for the customers to call if they wanted to restrict Sprint LD's use of their CPNI. Sprint LD now includes such notice in the terms and conditions booklet each customer receives as a result of detariffing. Such notice is posted on Sprint LD's web site as well.

Similarly, each of Sprint's local carrier subsidiaries provides a CPNI notice to its customers in the form of message included on the customers' bills. Such message informs customers to call the local carrier's business office if they want to restrict such carrier's use of their CPNI.

To Sprint's knowledge, no customer of these subsidiaries has voiced any serious objections to the opt-out approach. In fact, none of these subsidiaries have been served with a formal or informal complaint by the Commission from one of their customers objecting to the opt-out mechanism. Again, this is hardly surprising. Use of opt-out procedure for protecting a person's nonpublic information from disclosure to a company's affiliates and even unaffiliated third parties is commonplace in the commercial world. Banks, brokerage firms and credit card companies, for example, all employ opt-out mechanisms. And, some of these institutions make it relatively burdensome for the customer to "opt-out" by requiring the customer to fill out an "opt-out" form and mail it to the company instead of simply providing a toll-free or local telephone number for the customer to call.[1]

In short, it makes little, if any, sense for the Commission to attempt to resurrect a regulatory paradigm of questionable Constitutionality. It should simply leave it to the individual carrier to ensure that it obtains its customers' approval before using or disclosing to affiliated companies its customers' CPNI for marketing products and services outside of the its relationship with such customers. Carriers that ignore their obligations under Section 222 will be subject to complaints by their customers and/or forfeitures and fines imposed by the Commission. But, if contrary to Sprint's position here, the Commission insists on promulgating regulations governing how carriers should obtain such approval, it should adopt the opt-out approach that is now commonly used by other industries, and in light of the 10th Circuit's

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[1] The Commission notes (*Second FNPRM* at fn. 36) that "health care providers who have a direct treatment relationship with their patients [must] obtain affirmative opt-in consent of their patients in order to use and disclose protected health information for treatment, payment and health care options." The requirement that health care providers use an opt-in consent mechanism is justified because the status of a person's health, if disclosed, can adversely affect a person's livelihood; access to insurance; etc. Sprint strongly doubts that the fact that a customer takes one or two lines from his/her local carrier would lead to such untoward effects.

decision, is likely be used by most telecommunications providers today.[2]

III. THE COMMISSION SHOULD ADDRESS THE PRIVACY ISSUES ASSOCIATED WITH WIRELESS LOCATION INFORMATION IN THE DOCKET THAT HAS BEEN ESTABLISHED FOR THIS VERY PURPOSE.

Although the Commission has requested the parties to address the disclosure and use of wireless location information as provided for under Section 222(f), it need not -- and should not -- consider the privacy issues associated with the availability of wireless customer location information in this proceeding. Rather, this important privacy issue should be addressed in the proceeding (Docket No. 01-72) that the Commission has commenced for this very reason.

Two years ago, Congress amended Section 222 of the Communications Act by adding wireless location information to the definition of CPNI and by establishing special conditions governing the use or disclosure of wireless location information.[3] The Cellular Telecommunications and Internet Association filed last Fall a rulemaking petition asking the Commission to establish location information privacy principles to govern this new statute.[4] On March 16, 2001, the Commission established Docket No. 01-72 to consider this proposal, and pleadings have been submitted in response.[5]

There is broad consensus that the Commission should consider wireless location issues separately from other CPNI issues. As the Center for Democracy and Technology has advised

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[2] Sprint has no objection to waiting for a certain length of time after informing the customer of his/her CPNI rights for the customer to "opt-out" before a carrier is allowed to use or disclose to affiliates the CPNI of the customer in order to market additional products and services unrelated to customer's current service offering. In this regard, the Commission's suggestion of 30 days appears to be reasonable.

[3] *See* Wireless Communications and Public Safety Act of 1999, Pub. L. 106-81, *enacting* Section 222(f) *and amending* Section 222(h)(1).

[4] *See* CTIA, Petition for Rulemaking, Docket No. 01-72 (Nov. 22, 2000).

[5] *See Public Notice,* "Wireless Telecommunications Bureau Seeks Comment on Request to Commence Rulemaking to Establish Fair Location Information Practices," WT Docket No. 01-72, DA 01-696, 16 FCC Rcd 5599 (March 16, 2001).

the Commission, a "separate rulemaking is appropriate because wireless location information is governed by different statutory language."[6] The Electronic Privacy Information Center has similarly noted that wireless location issues involve "technologies, players, and policy considerations that are different than those involved in the protection and regulation of traditional forms of CPNI."[7] Sprint, therefore, recommends that the Commission consider wireless location privacy issues in Docket 01-72 rather than in this proceeding.

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6 CDT Comments, Docket No. 01-72, at 8-9 (April 6, 2001).
7 EPIC Comments, Docket No. 01-72, at 2 (April 6, 2001).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **COMMENTS OF SPRINT CORPORATION** was sent by hand or by United States first-class mail, postage prepaid, on this the 1st day of November 2001, to the parties on the attached list.

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